IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 1097 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

NATIONAL CARRYING CORPORATION - Appellant(s)

Versus

INCOME TAX OFFICER - Opponent(s)

==========

Appearance :
MR RK PATEL for Appellant
None for Opponent(s) : 1,
==========

CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 21/02/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1.The appellant has proposed the following three questions stated to arise out of Tribunal's order dated 1-2-2005:

> “[1] Whether, on the facts and in the circumstances of the case, the Tribunal has substantially erred in law in ignoring the ratios of decisions of Apex Court and jurisdictional High Court in case of P.K.NOORJAHAN at 237 ITR 570 and NATIONAL TEXTILES at 249 ITR 125, respectively while confirming the levy of penalty of Rs.1,26,000/- under section 271(1)(c) of the Act when the said ratios form the basis of deletion of penalty by the first appellate authority?
>
> [2] Whether, on the facts

and in the circumstances of the case, the Tribunal has substantially erred in law in disregarding the ratio of Hon'ble Apex Court in the case of ORISSA CORPORATION at 159 ITR 78 and confirming the levy of penalty under section 271(1)(c) at Rs.1,26,000/- even though the appellant has discharged the onus within the parameters of the ratio of the above referred decision?

[3] Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in interpreting the provisions of section 271(1)(c) read along with Explanation thereto by placing `disproved' as equivalent to `unproved' on analysis of

appellant's explanation in quantum and penal proceedings?”

2.Mr.R.K.Patel, the learned advocate for the appellant has assailed the impugned order of Tribunal on the ground that the Tribunal has failed to consider and deal with the order of Commissioner (Appeals), who had deleted the penalty levied on the assessee by the assessing officer under Section 271(1)(c) of the Income Tax Act, 1961 (the Act). It was submitted that the Tribunal has not dealt with, nor taken into consideration the decision rendered by this Court in case of National Textiles v. Commissioner of Income Tax, [2001] 249 ITR 125, on the basis of which the Commissioner (Appeals) had deleted the penalty and hence, the impugned order of Tribunal was vitiated. According to him, merely because in the assessment proceedings, an addition came to be confirmed by the Tribunal by taking recourse to

a deeming provision, namely, Section 68 of the Act, that by itself was not sufficient to confirm the levy of penalty for concealment. That the assessee had discharged the onus and at the highest, it could be stated that the case of the assessee remained unproved, but it was never disproved. In other words, the Tribunal had, according to him, approached the issue from a legally untenable premise. Lastly, it was submitted that, in light of the ratio of the Apex Court decision in the case of Commissioner of Income Tax v. Orissa Corporation P. Ltd., [1986] 159 ITR 78, the approach of the Tribunal in upholding the order of the Assessing Officer gave rise to a substantial question of law, namely, whether the assessee had discharged the onus in the facts of the case?

3.The facts reveal that the assessee firm is a booking agent for a New Delhi based concern

named Om Carrying Corporation. On the bookings made by the assessee for transportation of goods from Rajkot to Delhi, the assessee receives commission. In the course of assessment proceedings, the assessing officer examined the books of accounts and found that there were cash credits to the tune of Rs.2,25,000/- under the head “drivers' deposits”. It appears that the credits were in the name of 49 different persons ranging from amounts of Rs.3,000/- to Rs.7,000/-. The assessing officer did not accept the explanation tendered by the assessee that the amounts were deposited by the respective drivers out of the sums given to the drivers in the form of advance freight as well as amount for expenses enroute. Ultimately, the addition made by the assessing officer came to be confirmed upto the stage of Tribunal and rested there.

4.In the course of penalty proceedings, the assessee submitted 49 Kabulatnamas stated to be of 49 depositors, but the assessing officer did not accept the explanation and levied penalty under Section 271(1)(c) of the Act. The assessee carried the matter in appeal before the Commissioner (Appeals) and succeeded. The Department, preferred an appeal before the Tribunal, and succeeded before the Tribunal.

5.The Tribunal has recorded the following findings of fact after appreciating the evidence on record:

(1).The explanation that the drivers have deposited the money with the assessee as the same was not needed by the drivers was not acceptable because such deposits did not bear any interest.

(2).No evidence to establish genuineness of the

deposits was led by the assessee as letters issued to the drivers at the addresses given by the assessee were returned back unserved.

(3).The Kabulatnamas produced during the course of penalty proceedings remained unsubstantiated as the assessee failed to produce the persons making the Kabulatnamas.

(4).The letter filed by the assessee stated to have been received from Rajkot Goods Transport Association was not treated as a valid piece of evidence by the assessing officer and nothing had been brought on record to substantiate the same.

(5).The contention regarding repayment of the amount to the drivers was also not supported by any documentary evidence, nor was the mode and manner of repayment available on record.

(6).The entire amounts relating to 49 truck drivers are stated to have been repaid on four different dates, but no details are available. The Tribunal, therefore, did not attach any evidentiary value to the copy of the ledger account produced by the assessee.

6.On these facts, the Tribunal recorded that the explanation offered by the assessee was not only not substantiated, but was also not found bona fide, as required by Explanation I to Section 271(1)(c) of the Act. In this context, the Tribunal took into consideration the fact that, out of the total amount paid to the drivers towards freight and for expenses enroute, substantial amounts remained with the assessee. By way of an illustration, the Tribunal has referred to case of one of the drivers while reproducing the entire chart in paragraph No.12 of the order. The Tribunal has further recorded that the explanation on the

basis of which an assessee can discharge the onus has to be one which is neither fantastic nor unacceptable and, each and every explanation tendered by an assessee need not be accepted, if the facts on record do not go to substantiate the explanation.

7. In light of the aforesaid findings of fact and evidence on record, no infirmity appears in the impugned order of Tribunal. As can be seen from the facts on record in case of the payment to the tune of Rs.10,000/-, a driver has been shown to have deposited an amount of Rs.7,000/- or Rs.6,000/- with the assessee, similar is the case with other payments and deposits. In relation to the 49 Kabulatnamas filed with the assessing officer, the assessee has stated in the forwarding letter that the name, address, amount etc. have been shown in the list submitted along with the 49 Kabulatnamas, which would go to show that the Kabulatnamas filed

before the assessing officer could not be given credence to unless and until the same were substantiated by either production of the person making the Kabulatnama or supported by any further evidence to establish the genuineness of the transaction as well as the identity of the party.

8. In the result, the Tribunal having appreciated the evidence on record in light of well settled legal position, the impugned order of Tribunal does not give rise to any substantial question of law. The appeal is accordingly dismissed.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

parmar*